Supreme Court, U.S.
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No. 98-842

In The

Supreme Court of the United States

October Term, 1998

LILLIAN DERRYBERRY,
Individually, and as Next Friend of James L. Bryant,
Petitioner,

v.

NATIONSBANK OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari To The Texas First Court Of Appeals

BRIEF IN OPPOSITION

JEFFREY J. BROOKNER
Counsel of Record
ERIC LIPPER
HIRSCH & WESTHEIMER, P.C.
700 Louisiana, 25th Floor
Houston, Texas 77002-2728
(713) 220-9122
Attorneys for Respondent

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OR CALL COLLECT (402) 342-2831

CORPORATE STATEMENT

NationsBank's parent company is NB Holdings Corporation. NationsBank's nonwholly-owned subsidiaries are:

1. BBI Merchant Processing Company, LLC (94.952%)
2. Community Reinvestment Group, L.C. (61.5%)
3. Education Financing Services, LLC (capped at 22.6%)
4. First Housing Development Corporation of Florida (21.0%)
5. Heathrow, Inc. – common stock (45.206%) – preferred stock (49.894%)
6. Montgomery Homes Limited Partnership II (33.3%)
7. Savannah Community Development Corporation (21%)
8. Tower Holdings, L.P. (99%)

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ARGUMENT

The role of the Supreme Court is to harmonize the law by resolving conflicts within a court of appeals or between the courts of appeals, to interpret statutory and constitutional provisions, and to resolve important issues of law. As a leading commentator has observed:

> [T]he U.S. Supreme Court cannot possibly hear all litigants who present a worthy claim that a lower court has committed an error falling within its corrective jurisdiction. Both the justices and commentators agree that the Court must husband its scarce adjudicatory resources for the most fundamental constitutional and statutory questions, along with an occasional question of federal common law, sparing such additional energy as it can muster to seek as much uniformity as possible on lesser questions.

Wright et al., *Federal Practice and Procedure*, § 4001, at 4 (2d ed. 1996).

This case does not justify the allocation of resources necessary to address the issues involved, and the Court would likely affirm after spending those resources. Thus, the Petition should be denied.

I. This case is not of the character typically reviewed by the Court because the Texas Court of Appeals' opinion does not conflict with any opinion of the Court.

Rule 10 of the Rules of the Supreme Court of the United States "indicate[ ] the character of the reasons measuring the Court's discretion" in reviewing petitions for writs of certiorari. In particular, when the challenged

opinion was issued by an intermediate state court, review usually is limited to important federal questions or issues decided contrary to a prior opinion of the Court.[1]

The present petition seeks a writ to an intermediate Texas appellate court. Because the United States Supreme Court has never addressed the issue raised in the Petition, and because the issue is not important to the nation's jurisprudence, Rule 10(c) is not implicated. Therefore, the Petition should be denied.

II. This case does not present a good opportunity to review the issue raised in the Petition because the facts are atypical.

Ms. Derryberry asserts that this case closely parallels *Tom v. First American Credit Union*[2], in which a credit union enforced a preexisting debt by exercising a contractual right of setoff against its customer's traceable social security funds. The credit union argued that setoff was not a "legal process" and thus was not prohibited by 42 U.S.C. § 407(a). The Tenth Circuit rejected this argument.[3] If the credit union had petitioned for a writ of certiorari, this Court would have had an opportunity to address the argument. No such petition was filed.

Although this case implicates the same issue, other issues muddy the waters and alter the equities. NationsBank became Ms. Derryberry's creditor only through the

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[1] Rule 10(c).

[2] 151 F.3d 1289 (10th Cir. 1998).

[3] *Id.* at 1291-93.

machinations of a complex, bizarre, and rarely litigated federal regulation which obligated NationsBank to repay the Federal government for excess VA benefits paid to Ms. Derryberry. After returning the funds to the Federal government, NationsBank became entitled to recoup those funds from Ms. Derryberry. If the Court adopts the Tenth Circuit's rationale from *Tom*, NationsBank will be left with an out-of-pocket loss through no fault of its own.

In *Tom*, the Tenth Circuit gave greater weight to the rights of social security recipients than the rights of banks attempting to collect debts:

> [W]e will not create an exception [to Section 407(a)] that would, for the most part, serve very private interests – banks' desires to cut bad-debt losses.

In contrast, the present case involves a choice between two unsavory options: (1) depriving an elderly woman of her social security funds, or (2) arbitrarily imposing liability on a bank that did nothing wrong and that did not assume risk voluntarily. The Court should not settle an area of law on such atypical facts.

Also, the Court should note that the courts below have not left Ms. Derryberry without relief. The Texas Court of Appeals reinstated her state-law claim for breach of contract, and the Texas Supreme Court denied NationsBank's Petition for Review. Thus, Ms. Derryberry will get a new trial even if the Court denies the present Petition.

III. The Court should not settle this issue until more lower courts have a chance to address it.

NationsBank has found only four published opinions addressing whether setoff against social security proceeds violates Section 407(a). The two circuit-level opinions[4] are the most recent, and both hold that Section 407(a) prohibits setoff. The two older opinions, one by a district court[5] and one by a bankruptcy court,[6] disagree, but neither was appealed to the circuit level. Thus, there is no circuit split. The Court should not settle the issue until other courts are given the opportunity to develop all available arguments.

IV. The Court should not allocate its resources to this case because the opinion below is unpublished.

When the Court grants certiorari, it often does so not only to adjudicate the present case but also to prevent lower courts in future cases from relying upon bad precedent. In this case, no such benefit would result because the opinion was not published:

> Opinions not designated for publication by the court of appeals have no precedential value and

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[4] *Tom v. First Am. Credit Union*, 151 F.3d 1289, 1291-93 (10th Cir. 1998); *Crawford v. Gould*, 56 F.3d 1162, 1166 (9th Cir. 1995).

[5] *Frazier v. Marine Midland Bank, N.A.*, 702 F. Supp. 1000, 1003 (W.D.N.Y. 1988).

[6] *In re Gillespie*, 41 B.R. 810, 812 (Bankr. D. Colo. 1984).

> must not be cited as authority by counsel or by a court.[7]

Thus, lawyers and judges will not rely upon the opinion below and the Court does not need to scrutinize that precedent.

V. Ms. Derryberry did not properly present all of her arguments to the trial court below.

Ms. Derryberry alleges two distinct violations of Section 407(a). First, she alleges a violation of the first sentence, which prohibits "execution, levy, attachment, garnishment, or other legal process" against Social Security proceeds. This argument was properly presented to the courts below.

Second, Ms. Derryberry argues that the deposit agreement is an assignment and therefore violates the second sentence of Section 407(a). This issue was not raised before the trial court (Pet.'s App'x at J-1 to J-11). The issue was raised before the Texas Court of Appeals, but that court's opinion did not address the argument (Pet.'s App'x at A-12 to A-13). Thus, the issue is not properly before the Court.[8]

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[7] Tex. R. App. P. 47.7 (West 1998).

[8] *Bailey v. Anderson* (326 U.S. 203, 207) (holding that a claim raised for the first time before a state appeals court is preserved for review by the United States Supreme Court only if the appellate court expressly passes upon the issue in question); *see also* Tex. R. App. P. 33.1(a) (West 1998) ("As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was timely made to the trial court . . . . ").

VI. The opinion of the Texas Court of Appeals was correct.

Finally, the Court should not review the Texas Court of Appeals' opinion because that court resolved the issue correctly. Section 407(a) (Pet.'s App'x at E-1) protects social security proceeds from "execution, levy, attachment, garnishment, or other legal process." NationsBank did not employ any of the listed remedies. This case therefore turns on whether the right of setoff is an "other legal process." Because setoff is not a legal process, the Texas Court of Appeals' opinion was correct and should not be disturbed.

The common thread connecting the items enumerated in Section 407(a) is the use of state power to seize funds to pay a debt; therefore, the term "other legal process" should be interpreted to include only those acts which share this trait.[9] For example, the appointment of a receiver to take control over social security proceeds would violate Section 407(a), although receivership is not specified as a prohibited remedy.

In contrast, setoff does not employ the state's powers. It is a private, contractual right, not a legal process. Thus, Section 407(a) does not bar setoff.

This reading of the statute comports with the normal usage of the term legal process. A "process" is "any means used by court to acquire or exercise its jurisdiction

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[9] *Brogan v. U.S.*, 118 S. Ct. 805, 809 n.2 (1998).

over a person or over specific property."[10] A "legal process" is any process which is lawful.[11] Thus, Section 407(a) protects social security funds from any means used by a court to acquire or exercise jurisdiction over the funds. The listed items (execution, levy, attachment, and garnishment) all satisfy this definition. Congress evidently was concerned that similar processes, not listed, should be barred as well. The phrase "other legal process" goes no further than that.

The Tenth Circuit in *Tom* claims to read the phrase "other legal process" expansively to accomplish Congress's purposes. In reality, the *Tom* opinion altogether ignored the phrase to reach the desired result.

PRAYER

Because this case does not justify Supreme Court review, and because the decision below was correct, Ms. Derryberry's Petition for Certiorari should be denied.

Respectfully submitted,

JEFFREY J. BROOKNER
Counsel of Record
ERIC LIPPER
HIRSCH & WESTHEIMER, P.C.
700 Louisiana, 25th Floor
Houston, Texas 77002-2728
(713) 220-9122
Attorneys for Respondent

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[10] *See Black's Law Dictionary* 1205 (6th ed. 1990).

[11] *Id.*